16

No. 91-471

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

AMICUS CURIAE BRIEF IN SUPPORT OF GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; AND JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS, SUBMITTED BY THE STATES OF OHIO AND KENTUCKY ON BEHALF OF THE STATES OF INDIANA, UTAH, NEW MEXICO, SOUTH DAKOTA, KANSAS, LOUISIANA WYOMING, MICHIGAN AND TENNESSEE

CHRIS GORMAN
Attorney General
Commonwealth of Kentucky

By: **STAN COX**
Assistant Attorney General
909 Leawood Drive
Frankfort, Kentucky 40601

LEE FISHER
Attorney General of Ohio

By: **NANCY J. MILLER***
Deputy Chief Counsel
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2766

*** Counsel of Record**

MARY KAY SMITH
Assistant Attorney General
Co-Counsel

4

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215

RICHARD P. IEYOUB
Attorney General of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804
(504) 342-7013

FRANK J. KELLY
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

TOM UDALL
Attorney General of New Mexico
P.O. Drawer 1508
Sante Fe, New Mexico 87504-1508
(505) 827-6000

MARK W. BARNETT
Attorney General of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501-50700
(605) 773-3215

PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

CHARLES W. BURSON
Tennessee Attorney General
and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243
(615) 741-6474

QUESTION PRESENTED

Whether an Alabama statute that imposes a reasonable hazardous waste disposal tipping fee on out-of-state waste and an annual volume limitation, both of which are designed to protect and compensate Alabama for the health and safety and costly environmental risks it assumed when it sited a hazardous waste disposal facility that accepts nearly 90% of its waste from out-of-state generators, violates the Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

FEDERAL REGULATIONS

OTHER SOURCES AND AUTHORITIES

STATEMENT OF INTEREST

Most of the *Amici* states have been authorized by the U.S. Environmental Protection Agency (U.S.EPA) to operate a hazardous waste management program "in lieu of" federal law pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. Section 6926(b). Nonetheless, improvidently broad judicial applications of *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), have frustrated the states' abilities to meet the policies and mandates of federal law, or implement their own hazardous waste management policies and strategies. In the discrete area of solid waste, states have been continually frustrated in their attempts to enact reasonable measures to control interstate waste, despite the health and safety reasons advanced, reasons which exist in immeasurably greater magnitude in the hazardous waste field. This case is the opportunity by which the Court can clarify or limit the principles announced in *City of Philadelphia,* and thereby suggest a course of action for those states which have been thwarted in their efforts at reasonable interstate hazardous waste management. With benefit of a decision defining state authorities in the area of interstate hazardous waste management, it is hoped that responsible states like the *Amici* states can be spared the constant frustrations that they have been forced to suffer due to misapplication of *City of Philadelphia v. New Jersey,* both to factually distinct solid waste cases, and altogether to the unique area of hazardous waste management. Further, although the respective laws of Alabama and the *Amici* states differ substantively and their factual bases are somewhat distinct, an explanation from the Court of the proper authority and standards which apply to the states in interstate hazardous waste management will be of immeasurable value in guiding the Amici states in their implementation of the federal structure and requirements of RCRA as authorized to the states under approved programs.

SUMMARY OF ARGUMENT

Two of the great and pressing pollution problems facing the nation today are the need for the siting of hazardous waste disposal facilities and the need for effective hazardous waste management. Unfortunately, courts in this country have broadly and anachronistically expanded the holding in *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), in a manner which thwarts, rather than promotes, these goals. Specifically, the majority in *City of Philadelphia,* which had before it an exclusively solid waste case, failed to address, much less appreciate, the inherent and undeniable dangers in the transportation and disposal of hazardous waste. Further, our vastly increased knowledge about the dangers of hazardous waste, and the comprehensive regulatory schemes that have developed on the state and federal levels on the basis of that knowledge since that time, warrant special consideration of hazardous waste outside the traditional parameters of the Commerce Clause of the federal Constitution expressed in *City of Philadelphia.*

As set forth in the following argument, there are many reasons why the principles announced in *City of Philadelphia* should not apply to hazardous waste cases. The *Amici* particularly emphasize the similarities between hazardous waste and those items permissibly banned by states in the quarantine cases long ago decided by the Court. Precedent established in those cases survives in the more recent decision of the Court in *Maine v. Taylor,* 477 U.S. 131 (1986), which is the more appropriate rule to be applied to the interstate transportation of dangerous hazardous waste.

Further, the *Amici* states refer the Court's attention to the number of significant pieces of federal environmental legislation passed since the mid-1970's. Congressional recognition of hazardous waste as a significant national problem is evident in this great emphasis on regulating waste and, more recently, hazardous waste, since 1976. These developments lead to the inescapable conclusion that *City of Philadelphia,* insofar as it has been broadly misapplied by the lower courts, should instead be limited to its historical

context, and recognized as a legal relic decided by this Court at a time at which the financial and environmental burdens which have ultimately proved to result from the unrestricted disposal of toxic and hazardous waste could not have been fully realized. Along this line, the *Amici* submit that the pervasive and comprehensive regulation of hazardous waste, which is necessitated by its known as well as its unknown dangers, indicates that the present day waste management process should invoke permissible control and regulation over undesirable waste streams under the states' sovereign powers, rather than the restraints applied to traditional items of commerce in "goods".

The need for state control over the interstate transportation of hazardous waste also stems from the lack of control over the out-of-state generator of hazardous waste. In this respect, out-of-state waste is inherently different from in-state hazardous waste, such that the value of *City of Philadelphia*, which prohibited discrimination based solely on the origin of the solid waste, is again called into question. The duty of states under the Resource Conversation and Recovery Act regulations adopted in 1980 to provide for the independent inspection and verification of hazardous waste is exceedingly difficult, if not impossible, where out-of-state generators are involved. The inability to regulate the manner in which such wastes are generated may result in the unlawful disposal of certain hazardous wastes in facilities not equipped to landfill such waste, may unduly prejudice the importing state's waste management law and policies and may impose health and environmental burdens on the disposal state.

The Court has never squarely addressed the issues attendant to the interstate transportation and disposal of hazardous waste. *City of Philadelphia* dealt exclusively with the interstate transportation of municipal solid waste. As a consequence of the failure to precisely address a state's power to enact reasonable restrictions on the interstate movement of hazardous waste in order to protect the public health and the integrity of a state's natural resources, the Court has never decided whether hazardous waste is an

article of commerce entitled to full constitutional protection. Absent this specific guidance, the proper analysis for this discrete regulatory field of publicly-perceived "bads" is that contained in Chief Justice Rehnquist's dissent in *City of Philadelphia*. In that dissent, Chief Justice Rehnquist would have upheld New Jersey's ban under the authority of the quarantine cases. *City of Philadelphia*, at 632 (Rehnquist, J., dissenting). *Maine v. Taylor*, 477 U.S. 131 (1986), a case engendered by that dissent, is the proper basis for decision in this case. The peculiar hazards associated with the hazardous waste industry must be recognized as warranting the same considerations as the quarantined items permissibly banned in *Bowman v. Chicago & Northwestern Railroad Company*, 125 U.S. 465 (1888), and the hazardous waste situation should be clearly set apart from the Court's consideration of solid waste issues.

In the alternative, the Court should take advantage of the opportunity presented in this case to reexamine *City of Philadelphia*. Many of the assumptions underlying the *City of Philadelphia* decision are of questionable application to dangerous hazardous waste. One notable distinction which the *City of Philadelphia* majority altogether failed to recognize is that the purpose of waste stream regulation is regulation and control, not consumption. The hazardous waste stream is not a commodity for purchase which states are inclined to hoard, but a liability which should be managed by those who generated it. States which import hazardous waste are currently powerless to independently verify the contents of the waste at the point of generation, and therefore should have power to control the influx of waste which may violate their waste management policies, e.g., toxics use reduction or overall waste minimization.

Finally, when a sovereign state reasonably limits or restricts the use of its disposal facilities, this does not prevent other states from similarly addressing their own needs, nor infringe upon any of the national values traditionally protected by the dormant Commerce Clause. Consequently, although *Maine v. Taylor* may indeed serve as the basis for this Court's affirmance of the Alabama Supreme Court's determination

that Alabama may protect and compensate its citizens from the dangers to health and the environment associated with the huge volumes of out-of-state waste imported to the Emelle facility for permanent landfilling, this Court should additionally use the opportunity presented in this case to overrule *City of Philadelphia.*

ARGUMENT

I. Inappropriately Broad Judicial Application Of *City of Philadelphia* To The Interstate Transportation And Disposal Of Hazardous Waste Has Fostered Public Opposition To The Siting Of Much-Needed Hazardous Waste Disposal Facilities And Conflicts With Congressional Policy.

The real significance of the threat posed to our industrialized society by hazardous waste has only dawned on the public over the past ten to fifteen years. The Emelle facility in Alabama was one of the first permitted disposal facilities in the country. It was permitted in 1978, the same year *City of Philadelphia* was decided by this Court, and nearly three years before the all-encompassing federal RCRA regulations forever changed state duties and obligations with respect to hazardous waste. Because this overbroad and outdated application of *City of Philadelphia* potentially obligates every state to accept hazardous waste without any qualifications or restrictions imposed on sources, not one new operational hazardous waste landfill has been developed in the United States in the last 11 years. As a result, it is undisputed that Alabama, Ohio and other net importing states are handling a grossly disproportionate share of the nation's hazardous waste disposal and treatment burden. Without benefit of enlightened decisions such as that by the Alabama Supreme Court below, states which accept their responsibility to treat and dispose of, at a minimum, certain types of their own hazardous waste, are absolutely powerless to ensure that such created capacity will exist for such disposal, and are deprived of control over the influx of this dangerous and environmentally costly waste.

As a result of political pressures arising out of the Not In My Back Yard (NIMBY) syndrome across the nation, and overbroad applications of the Commerce Clause principles handed down in *City of Philadelphia* as herein advocated by Chemical Waste Management, states which otherwise might site facilities will persist in their refusal to authorize hazardous waste disposal sites. The main beneficiaries of this improper application are landfill operators, like Petitioner, which seek to maximize their profits by filling state authorized capacity at the fastest rate possible, without regard to whether such unrestricted disposal furthers responsible state, regional or national hazardous waste management policy as clearly expressed in the debates surrounding the Superfund Amendments and Reauthorization Act of 1986, Pl. 99-499 (discussed, *infra.)* Consequently, states, rather than responsibly siting their own facilities, continue to irresponsibly dump huge amounts of hazardous waste on other states like Alabama.

The lynchpin of Chemical Waste Management's arguments to this Court, *City of Philadelphia,* is clearly distinguishable from the present hazardous waste case for a number of reasons. First, unlike the simple solid waste or garbage dealt with in *City of Philadelphia,* the instant case concerns hazardous waste, which is inherently dangerous in all respects, including transportation as well as disposal. Second, unlike the State of New Jersey in *City of Philadelphia,* Alabama is not attempting to hoard its remaining hazardous waste landfill space by isolating itself from a common problem. Alabama is not erecting a rigid ban against the movement of all out-of-state hazardous waste, but is only seeking to limit the volumes of hazardous waste coming to Emelle from out-of-state generators and to ensure that these out-of-state generators bear a fair share of the financial burdens and costly environmental risks potentially posed by the transportation of hazardous waste, and by its ultimate disposal there. Finally, unlike New Jersey in *City of Philadelphia,* Alabama's actions are a reasonable and legitimate exercise of its police powers aimed at protecting its natural resources and the health of its citizens through a more equitable cost-sharing among those states which

have *chosen* to use Emelle as an alternative to siting politically undesirable hazardous waste facilities within their own borders. Importantly, *City of Philadelphia* does not hold that a state may not limit importation of wastes to protect health and the environment, it holds only that a state may not do so for simple economic protectionism. Thus, the clearly-expressed health and safety purposes underlying the Alabama law remove it from the coverage of *City of Philadelphia*.

As mentioned previously, *City of Philadelphia* quite clearly neither involved nor addressed hazardous waste. By implication, however, the Court in *City of Philadelphia* left the door open to discrimination on the basis of the "harmful effects" of the subject item of commerce, refusing to apply the quarantine line of cases primarily because there was no claim by New Jersey "that the very movement of waste into or through New Jersey endangers health." *City of Philadelphia*, at 628-629. Here, the allegations are undeniably to the contrary, and the extensive federal and state regulation of hazardous waste supports the claim of the necessity of *control*, as well as effective management. Particularly on the federal level, the recognition of hazardous waste as a significant and serious threat separate and apart from solid waste, is evident in the multitude of comprehensive laws which have been passed by Congress since the mid-1970's. Beginning in 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6987, which established a "cradle to grave" regulatory scheme for hazardous waste. Also in 1976, Congress enacted the Toxic Substances Control Act of 1976 (TSCA), Pub. L. 94-469, which was a comprehensive measure designed to protect the public and the environment from exposure to hazardous chemicals. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, which provided for the cleanup of hazardous waste sites and created the Superfund, a federal fund for cleanup in the event responsible parties fail to do so. In the same year, and nearly three years after the Court's decision in *City of Philadelphia*, U.S. EPA promulgated in excess of 1200 pages

of federal regulations which govern extensively state waste management programs under RCRA. In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, amending certain sections of CERCLA to ensure, among other things, that states assumed responsibility for developing or contracting for adequate hazardous waste capacity for the next twenty year period through the siting of newer and safer facilities.[1] Finally, in 1984, Congress passed the Hazardous and Solid Waste Amendments, Pub. L. 98-616 which, in further recognition of the inherent dangers of landfilling hazardous wastes, established a comprehensive program to regulate and restrict the land disposal of hazardous wastes. With regard to the transportation of hazardous waste, Congress enacted the Hazardous Materials Transportation Act of 1974, 49 U.S.C. 1801, et seq., which preempted the field in the important area of hazardous waste transportation regulation. These federal developments compel the conclusion that any reliance on *City of Philadelphia* as governing management of hazardous waste, the very movement (let alone disposal) of which poses recognized and pervasively regulated dangers, is misplaced. Given the persistent misapplication of the Court's opinion in *City of Philadelphia*, the instant case serves as the opportunity for the Court to resolve confusion in the law and to afford reasonable protections to states which have sited or plan to site hazardous waste facilities.

II. A State May, Under Its Police Powers, Restrict The Importation Of Articles Which Pose

[1] See, for example, H. Rep. No. 99-69, May 7, 1985 (H.R. 2005); H. Rep. No. 99-253(I), Aug. 1, 1985 (H.R. 2817); H. Rep. No. 99-253(II), Oct. 28, 1985 (H.R. 2817); H. Rep. No. 99-253(III), Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253(IV) Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253(V), Nov. 12, 1985 (H.R. 2817); S. Rep. No. 99-11, Mar. 18, 1985 (S. 51); S. Rep. No. 99-73, May 23, 1985 (S. 51); H. Conf. Rep. No. 99-962, Oct. 3, 1986 (H.R. 2005); H. Rep. No. 99-255, Sept. 4, 1985 (H.R. 3065). Despite the clear intent of these amendments, certain states still refuse to provide for their own disposal needs, deciding instead to burden states like Alabama with their wastes.

Health, Safety And Environmental Risks.

Despite the inapplicability of *City of Philadelphia* to the dangerous hazardous waste arena, this case is nonetheless governed by well-settled law. As recognized by the Alabama Supreme Court, hazardous waste, as an item bearing striking resemblance to the permissible items of quarantine in long-standing precedent of this Court, is not worthy of traditional Commerce Clause protections. In fact, Chief Justice Rehnquist would have upheld New Jersey's ban under the quarantine cases in his dissent in *City of Philadelphia:*

> [S]tates can prohibit the importation of items " 'which, on account of their existing condition, would bring in and spread disease, pestilence and death . . ."

City of Philadelphia, at 632 (Rehnquist, J. dissenting). This dissent is consistent with a multitude of earlier U.S. Supreme Court cases which hold that a state may, under its police powers, restrict the importation of articles which pose threats to the health and safety of its citizens and to its environment.[2]

In its most recent articulation of the quarantine logic, *Maine v. Taylor,* the Court indicated that such laws are not considered impermissible protectionist measures even though they are directed against out-of-state commerce. The Court never questioned whether Maine could restrict the importation of baitfish for the stated purpose of insulating its domestic baitfish crop from the harms posed by the introduction of damaging parasites. Although the statute facially discriminated against the interstate transportation of live baitfish, the Court upheld the ban as a reasonable means of accomplishing a legitimate state goal. See also, Brief of Amicus Curiae, Whatcom County, in Support of Respondents,

[2] *Asbell v. Kansas,* 209 U.S. 251 (1908); *Compagnie Francaise v. State Board of Health, Louisiana,* 186 U.S. 380 (1902); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Bowman v. Chicago and Northwestern R. Co.,* 125 U.S. 465 (1888).

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* No. 91-636, at 23-27 (explanation of appropriate test to employ in quarantine situations).

In *Maine v. Taylor,* the court recognized that the Commerce Clause does not prevent states from regulating substances where their risks are known. The Court explained this principle as follows:

> "Not all intentional barriers to interstate commerce are protectionist, however, the commerce clause 'is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community."

477 U.S. at 148, n. 19. The Court, speaking through Justice Blackmun, also recognized the practical limitations of the Commerce Clause where *unknown* environmental risks are clearly at issue, stating as follows:

> ". . . Maine has a legitimate interest in guarding against imperfectly understood environmental risk, despite the possibility that they may ultimately prove to be negligible. [T]he constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potential irreversible environmental damage has occurred . . ."

477 U.S. at 148. Therefore, subsequent to *City of Philadelphia,* the Court has recognized that states may also regulate substances where their risks are imperfectly understood, so long as the legitimate interests of the states in this regard could not be served as well by available nondiscriminatory means. *Maine v. Taylor,* 477 U.S. at 150.

The dangers of hazardous waste consist of both known and imperfectly understood risks. The breadth and technicality of hazardous waste disposal and transportation regulations demonstrate that many of the risks inherent in

transportation and land disposal are known. On the other hand, it is virtually impossible to predict exactly what will happen in the future of any hazardous waste landfill. Because experts generally agree that hazardous waste has a toxic life of about 5,000 years, nearly all of recorded history will double before we will be able to quantify the total risks which potentially stem from the siting of these facilities. Therefore, the rationale of *Maine v. Taylor* applies with great force to hazardous waste regulation to establish that hazardous waste, which the trial court found contained "poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death", are to be treated more like articles which spread "disease, pestilence and death"[3], than like desirable and ordinary items of commerce such as milk[4], apples[5] and wine[6]. In this regard it is clear, even under *City of Philadelphia*, that states may restrict or even ban articles which spread "disease, pestilence and death"; the value of commerce in such articles is outweighed by the inherent dangers. *City of Philadelphia, supra*, at 622. "The self-protecting power of each State, therefore, may be rightfully observed against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." *Bowman, supra*, at 489. Substantial dangers to public health, safety, and the environment of the state arising from the transportation and burial of hazardous waste were detailed by the court below. Under *Maine v. Taylor*, these dangers must be weighed against the values of unrestricted interstate commerce, in this case unrestricted importation of hazardous, toxic and dangerous waste materials for landfilling. Consequently, the solid waste

[3] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J. dissenting), quoting, *Bowman, supra*, at 489).

[4] *Dean Milk Company v. Madison*, 340 U.S. 349 (1951).

[5] *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

[6] *Bacchus Imports, Limited v. Dias*, 468 U.S. 263 (1984).

principles set forth in *City of Philadelphia* should not be applied to hazardous waste.

Thus, given that the states have a recognized police power-based interest in restricting unlimited hazardous waste imports, the second prong of *Maine v. Taylor* requires only that the subject state's purposes could not be satisfied by available nondiscriminatory means. As noted by the Alabama Supreme Court, the differential fee is the means by which Alabama's citizens can be directly compensated for the health and safety risks not assumed by the out-of-state generator and for environmental dangers resulting from disposal and transportation of such waste. The *Amici* submit that such a fee is the least intrusive means by which Alabama can recoup the myriad of "costs" it has assumed by stepping up to its duty to manage its own waste.

Notably, and despite the acknowledged dangers of hazardous waste (including both known and imperfectly understood risks under the language of *Maine v. Taylor*) the instant case does not seek a total ban on the interstate transportation of hazardous waste. In fact, it has been Alabama's goal all along not to isolate itself from other states' hazardous waste disposal problems. Alabama is merely seeking the dual goals of limiting the *volume* of waste which any facility is obligated to accept, and encouraging a more equitable national sharing of responsibility for hazardous waste management through regional cooperation and workable and enforceable siting criteria. These goals can be accomplished through a recognition of the peculiar dangers posed by intrinsically dangerous hazardous waste, and a clarification of the limits of the rules set forth in *City of Philadelphia* so as to allow environmentally responsible states to protect themselves from states which continue to ignore their fair share of the nation's hazardous waste burden. As discussed at great length by the court below, the means chosen by Alabama of a differential fee satisfies the second prong of *Maine v. Taylor* in that it is the *only* means by which Alabama can accomplish the goal of "compensating" its citizens, while still accommodating out-of-state waste.

In sum, *Maine v. Taylor* provides a viable vehicle by which this Court should uphold the decision of the Alabama Supreme Court. Alabama as well as other similarly situated states must be permitted to reasonably regulate commerce to protect and compensate their citizens for the health and environmental risks posed by the hazardous wastes imported from states which have chosen not to accept the responsibility for the substantial environmental and financial liabilities their citizens and industries generate.

III. The Lack Of Control Possible Over Out-Of-State Waste Streams Justifies Disparate Treatment Of Those Streams.

As noted previously, *City of Philadelphia* was decided in 1978, nearly three full years before the U.S. EPA enacted the RCRA regulations which encompass well over 1200 pages in the Code of Federal Regulations. Regardless of the wisdom of New Jersey's actions from 1975 to 1978, the world of environmental regulation dramatically changed with the promulgation of these regulations in 1980. 45 Fed. Reg. 12722 (Feb. 26, 1980) and 45 Fed. Reg. 33066 (May 19, 1980). Two of the key features of the 1980 regulations were the definition of "hazardous waste" as a unique subset of "solid waste", see 40 C.F.R. 261.3, and the required disposal of hazardous waste only at the facilities specifically permitted to handle not only hazardous waste, but also the *type* of hazardous waste proposed to be disposed. See, generally, 40 C.F.R. Parts 264 and 265.

In order to operate their own hazardous waste programs, states were required to develop hazardous waste management programs which met the minimum federal standards set forth at 40 C.F.R. Part 271. Of particular importance to this case was the requirement set forth at 40 C.F.R. 271.15 that states have inspection and surveillance authority to ensure that hazardous waste would be disposed of only at properly equipped and permitted facilities. Specifically, U.S. EPA's regulations required, in part, as follows:

> (b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements.

40 C.F.R. 271.15. The reason for the requirement that states must be able to conduct inspections, evaluations, and investigations to independently verify the accuracy of information submitted by the regulated community is inherent in the federal regulatory system. Specifically, many of U.S. EPA's "listed" hazardous wastes are source-specific and their listing as hazardous is based upon the manufacturing processes of the generator of the waste. See 40 C.F.R. 261.30 through 261.35. For example, "k001" hazardous waste, 40 C.F.R. 261.32, is "bottom sediment sludge from the bottom of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." Thus, a state regulatory inspector when confronted with an industrial sludge imported for disposal will need to know whether that sludge came from a generator source in the wood preservative industry, and whether creosote or pentachlorophenol was used by the generator. Another example is the land disposal restriction contained in the federal regulations at 40 C.F.R. 268, *et seq.* These regulations underscore the importance of the correct identification of hazardous wastes based on the nature of their generation by providing specific chronological milestones, after which a multitude of dangerous hazardous wastes may no longer be land disposed in any manner. Thus, the lack of state control over an out-of-state generator not only compromises the RCRA verification requirement for state programs, but also presents yet another opportunity for states to improperly dispose of unidentified hazardous waste in landfills in other states in ways that violate the land ban restrictions.

Despite the development of this pervasive federal scheme which requires that states independently verify and restrict certain hazardous waste from land disposal even where they have virtually no control over out-of-state generators, *City of Philadelphia* continues to be anachronistically cited for

the proposition (improperly conceded therein by New Jersey) that there are no differences between out-of-state and in-state waste streams which justify disparate treatment. In reality, because waste streams *are* streams rather than commodities, the fact that one stream remains totally in-state while another crosses state boundaries is itself a difference in kind justifying disparate treatment. The control which state governments may exercise over intrastate waste streams serves several functions, including ensuring that no improper waste enters the stream (not all hazardous waste facilities are equipped to handle all of the hundreds of types of hazardous waste), that disposal habits are changed so that only certain types of waste enter the stream (e.g., recyclables and compostables removed), and that the waste is handled and transported all along the stream so there is the least possible threat to health and environment. As required by RCRA, an intrastate waste stream may be regulated, inspected and controlled from point of generation to point of disposal. Practically speaking, a waste stream which originates out of state cannot be easily inspected at the point of generation or controlled by the state which will assume ultimate disposal burdens. However, the need for some sort of state control over interstate hazardous waste is not limited to RCRA considerations. In fact, the waste management policies which may be evident in state law or formal expressions of state agency policies can be ignored, if not outright defeated, by out-of-state waste generators.

When, for example, the disposal state's expressed concern is minimizing environmental harm by toxics use reduction, it is possible to rigorously inspect for compliance close at home with regard to both the nature of the waste itself, and in the manner of its generation. Thus, it is the control over what goes into the stream that ensures against the risk of improper disposal. A disposal state cannot impose such control over out-of-state generators. Not only might it be considered an infringement upon another state's sovereignty for a disposal state to insist that its waste management policies and obligations be satisfied by foreign generators, such efforts would also likely prove to be cost and manpower prohibitive. However, the disposal state should be able to

legitimately insist that only hazardous waste streams which have been fully and completely regulated according to the standards of the receiving state be entitled to disposal within such state. By more directly authorizing state restrictions on out-of-state generated streams, this Court would recognize the legitimate interest in minimizing the health and safety concerns associated with such streams. A state which does not have control over the complete waste steam should not be placed at risk by that waste stream, or be generally obligated to accept such waste irrespective of the waste management policies or hierarchies imposed on the receiving state's own citizens. If, for example, the purpose of state regulation is to affect disposal habits by encouraging recycling, waste reduction, etc., it is virtually impossible to impose such values on the source of an out-of-state generated stream. Nevertheless, when a state creates hazardous landfill space on condition that only waste which has been through a certain amount of recycling, waste reduction, etc., is accepted for disposal, the disposal state has a right to ensure, by imposing its own standards and conducting inspections by its own personnel, that such conditions have been met at the point of generation. Out-of-state generated streams never are capable of being fully subject to such rigorously imposed disposal state requirements.

The Court should recognize that allowing restrictions on out-of-state generated streams merely recognizes that the disposal state does not have power to impose the same type of controls over waste others generate that it may impose over wastes which are its own inherent responsibility. The less burdensome alternative of a tipping fee such as that charged by Alabama is clearly sustainable as a way of compensating the importing state for the risks and burdens which the exporting state is not obligated or has chosen not to assume. As recognized by certain lower courts, it is impractical to assume that inspectors in the state of generation of waste can be relied upon by the state into which the waste is brought for disposal. *Government Suppliers Consolidating Services, Inc. v. Bayh,* 743 F. Supp. 739 (S.D. Ind. 1990). Further, the absence of state control

over hazardous waste generated in other states serves to underscore the victimization which has occurred of states which have aggressively developed their own vigorous waste management policies, which other states, clothed with *City of Philadelphia,* remain free to ignore. *City of Philadelphia* should not be used as a sword by operators intent only on profits or by those states which cavalierly ignore the strides made by responsible states to manage and plan for their own hazardous waste disposal in a manner consistent with RCRA, nor as a means by which exporting states can ignore the waste management and/or minimization policies of other states.

IV. Additionally, The Court Should Take Advantage Of The Opportunity Herein Presented To Overrule *City of Philadelphia.*

As demonstrated above, *City of Philadelphia* does not control hazardous waste cases. Nevertheless, because the *City of Philadelphia* analysis has infected this area of state waste planning, the *Amici* states respectfully submit that this hazardous waste case presents an excellent opportunity for this Court to overrule *City of Philadelphia.* The *City of Philadelphia* implication that disposal facilities are natural resources is simply wrong. Additionally, limitations placed by a state on disposal facilities do not interfere with protected national economics. In fact, it is the contorted applications of *City of Philadelphia* which have resulted in the failure of the siting process for hazardous waste facilities across the nation, and which run counter to Congress' expression of policy in the Superfund Amendments and Reauthorization Act of 1986. In enacting these Amendments, Congress declared:

> A critical step in the implementation of a rational, safe hazardous waste program is the creation of new [hazardous waste disposal] facilities.

132 Cong. Rec. S. 14,924 (daily ed. Oct. 3, 1986). Further,

> Congress was concerned that certain states,

> because of political pressures and public opposition, were not able to create and to permit sufficient facilities within their borders to treat and securely dispose of (or manage) the amounts of wastes produced in those states."

Office of Solid Waste and Emergency Response, U.S. EPA, Assurance of Hazardous Waste Capacity: Guidance to State Officials. Later, Congress declared that the broader policy of the SARA was to maximize the national "economy" for hazardous waste by enacting measures designed to encourage the siting of disposal facilities despite political pressures in opposition:

> Pressures from local citizens place the political system in an extremely vulnerable position . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of siting new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years.

S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985).

In keeping with these policies, leaving the states free to negotiate the terms upon which they will accept other sovereign's disposal liabilities will better encourage the siting of facilities than Petitioner's "solution" of allowing any sited and existing facility to maximize private profit at the expense of state and regional planning. To the extent *City of Philadelphia* may be read to prohibit states from focusing primarily on their own hazardous waste disposal obligations and allowing disposal of other states' hazardous waste only on terms which truly reflect the obligation imposed, *City of Philadelphia* should be overruled.

A. The Fee Issues Before The Court In This Case Cannot Be Completely Divorced From Other Lower Court Decisions Which Have Used *City of Philadelphia* To Improperly Limit A State's

Ability To Solve Its Hazardous Waste Problems.

While the sole issue for which this Court has granted *certiorari* is the constitutionality of the fee imposed on hazardous waste coming into Alabama for disposal, the instant litigation has a larger history and context. Petitioner, for example, erroneously attempts to argue that the history of the Holley bill and other Alabama attempts to protect the health and environment of Alabama citizens amount to repeated efforts of economic protectionism. In fact, it has been Alabama's goal *not* to isolate itself from other states' hazardous waste disposal problems. Cf., *NSWMA v. Alabama Department of Environmental Management*, 729 F. Supp. 792, 804-805, (N.D. Ala. 1990) (Alabama facilities open to all states which plan for their hazardous waste disposal through in-state siting or interstate or regional agreements). Unfortunately, in *NSWMA v. Alabama Department of Environmental Management*, 910 F. 2d 713 (11th Cir. 1990), *cert denied* ___ U.S. ___ (1991), the Eleventh Circuit reversed and held unconstitutional Alabama's program of making its disposal capacity available only to those states which also had shouldered their hazardous waste management burdens by either entering into compacts or establishing RCRA approved siting programs. In other words, the Eleventh Circuit's contention that *City of Philadelphia* compels a state to grant access for waste originating in states which have not shouldered any of their hazardous waste management obligations, despite federal legislation approving such compacts, (see Note, "Constitutionally Mandated Southern Hospitality: National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management," 60 N. Carolina L. Rev. 1001, 1017 (1991)), exacerbates the "Hobson's choice" facing states which wish to responsibly manage waste on a regional basis, but do not desire to become the dumping ground for all the nation's hazardous waste problems. See, 437 U.S. at 631 (Rehnquist, J., dissenting). A ruling by the Court either that *City of Philadelphia* does not apply to hazardous waste disposal or that the *City of Philadelphia* case was wrongly decided would enable Alabama and other

states interested in entering into regional hazardous waste disposal agreements to do so without fear that any facility sited will receive unlimited amounts of waste which a "free-rider" generating state simply did not wish to manage.

B. Hazardous Waste Disposal Facilities Are Not Natural Resources.

The current relative scarcity of hazardous waste disposal facilities is an artificial rather than geologic phenomenon. Petitioner erroneously implies that U.S. EPA location restrictions make it impossible for hazardous waste disposal facilities to be sited in other parts of the nation. Petitioner's Brief at 4, 7-8. In fact, the U.S. EPA location standards contained at 40 C.F.R. Section 264.18 prohibit hazardous waste facilities only within 200 feet of a Holocene fault and in salt formations and underground mines and caves. As Appendix VI to 40 C.F.R. Part 264 graphically demonstrates, the number of locations seismically inappropriate is a finite and relatively limited number. Whatever may be the "benefits" of the underlying chalk formation associated with the Emelle facility, the *Amici* states emphasize that the main reason additional hazardous waste facilities have not been sited has nothing to do with geology, but instead involves local politics and legitimate state fears (based on their observation of what has happened at facilities such as Emelle) that any sited facility will become an uncontrolled dumping ground for the entire nation's hazardous waste problems.

The point is that every state, including those of the *Amici* states which do not currently have hazardous waste landfills within their boundaries, is geologically capable of supporting a hazardous waste disposal landfill under the EPA regulations. All such facilities are primarily manufactured rather than geological phenomena. See, e.g. 40 C.F.R. §264.301 (design requirements); *Cf.*, Cox, Burying Misconceptions About Trash and Commerce: Why It Is Time To Dump *Philadelphia v. New Jersey*, 20 Cap. U. L. Rev. 813, 820-22 (1991) (landfills are manufactured phenomena sited primarily by political factors.) The reason so few hazardous waste facilities currently are in existence is because people

do not want such facilities near where they live and work. States which otherwise might override local fears are legitimately reluctant to do so without guarantees that they can have some important say-so over how much waste from what locations goes into those facilities. *Cf. Swin Resources v. Lycoming County,* 883 F. 2d 245, 253-54, n. 3 (3rd Cir. 1989); (difficulty and burdens involved in siting disposal facilities implies need for some control over facilities by residents affected); Comment, "Recycling *Philadelphia v. New Jersey:* The Dormant Commerce Clause, Post-Industrial 'Natural' Resources and the Solid Waste Crisis," 137 U. Pa. L. Rev. 1309, 1328-36 (1989) (burdens associated with landfills should be compensated by some form of benefit or control); See also generally, Note, "Mandated Southern Hospitality," *supra,* 69 N. Carolina L. Rev. 1001. So long as lower courts are capable of holding that state controls on out-of-state hazardous waste might violate *City of Philadelphia,* few additional disposal facilities will be sited.

C. No Significant National Economic Goals Are Furthered By Prohibiting States From Controlling The Inflow Of Out-Of-State Hazardous Waste.

Petitioner's sole goal is maximizing *private* economic profit. While there is nothing necessarily immoral about this, Petitioner's desire to make the most money possible should not be confused with the economic protectionism and interference with other states' business which the dormant Commerce Clause sometimes prohibits. What Petitioner offers for sale is airspace --- space within its landfill for disposal of hazardous materials. Petitioner's competitors thus are other disposal facilities located in other states. Most dormant Commerce Clause challenges involve a state attempting to put "its" businesses in a more favorable competitive situation than out-of-state competitors. Obviously, Petitioner does not contend that this is what Alabama is doing in the instant case. In fact, Alabama's disposal fee arguably benefits out-of-state hazardous waste

disposal competitors, by making it relatively less expensive to dispose at facilities other than Emelle.[7]

In addition, and as Petitioner concedes, economics of scale generally lead to lower disposal costs. See Petitioner's Brief at 6-7. To the extent the fee here at issue deters volume (and it is Petitioner's contention that this is the effect of the fee) Alabama-based disposal facilities which receive significantly less hazardous waste would *raise* their disposal fees accordingly. In other words, as an end result of the fee which is being litigated, Emelle would become even less attractive to both in-state and out-of-state generators.

In short, economic protectionism is not the purpose or goal of the fee at issue here. What is instead at issue is whether a state which allows a hazardous waste disposal facility to be created within its boundaries may impose burdens and place limits on that disposal capacity, thereby reducing the amount of out-of-state waste which is shipped to the facility. As the trial court found, the risks and environmental dangers associated with hazardous waste disposal, even under rigorous EPA and state regulations, are real. Given that a state is mandated under CERCLA and RCRA to manage only its own hazardous waste, a state should be free to impose terms on out-of-state waste that compensate for the real environmental burdens associated with that waste disposal. See Note, "Mandated Southern Hospitality," *supra,* 69 N. Carolina L. Rev. 1001; *cf.* Comment, "Recycling *Philadelphia,*" *supra,* 137 U. Pa. L. Rev. at 1328-36.

Since hazardous waste landfills are not natural resources, and since the purpose and effect of the Alabama legislation here at issue is not economic protectionism but safeguarding the health and environment of Alabama citizens, the fee here

---

[7] If Petitioner's claim of lost volume is true, this illustrates both that Petitioner's sole complaint is lost revenue and that the Emelle facility is not uniquely necessary for hazardous waste disposal as Petitioner implies. The hazardous waste formerly destined for Emelle must have ended up at Petitioner's competitors' facilities.

being challenged should be upheld. As previously argued, *Maine v. Taylor*, the quarantine line of cases and the unique problems associated with hazardous waste all provide adequate authority for distinguishing this case from *Philadelphia v. New Jersey* and affirming the decision of the Alabama Supreme Court. Nevertheless, because language in *City of Philadelphia* improperly implies that waste disposal facilities are natural resources that can be hoarded, and because the *City of Philadelphia* rationale of no interference based on state of origin (even in litigation related to the instant case, see *NSWMA v. Alabama DEM, supra*.) has been applied to unduly limit states in their hazardous waste management operations, the *Amici* states respectfully submit that *City of Philadelphia* should be overruled. States managing their own hazardous waste do not violate the Constitution when they stop the flow of hazardous waste at their borders or impose fees or regulations on hazardous waste that originates from out of state.

CONCLUSION

The Amici states respectfully submit that this honorable Court should affirm the decision of the Alabama Supreme Court under the authority of *Maine v. Taylor*. In the alternative, the *Amici* states assert that this Court should determine that the pervasive regulation of hazardous waste, and the attendant interests of the sovereign states in such regulation, warrants that interstate dealings in dangerous waste be treated uniquely. Specifically, the *Amici* submit that states should be given clear authority to regulate the interstate movement of waste which poses threats to human health and safety and possesses the potential to become a severe environmental and financial liability to such states.

Respectfully submitted:

LEE FISHER,
Attorney General of Ohio

NANCY J. MILLER, Esq.
Counsel of Record
Deputy Chief Counsel
30 E. Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

MARY KAY SMITH, Esq.
Assistant Attorney General
Co-Counsel

APPENDIX A

40 C.F.R. §271.15 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittee and other regulated persons (and for investigation for possible enforcement failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other

regulated persons to develop that information;

(3) A program for investigations information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

APPENDIX B

40 C.F.R. §264.18 Location Standards.

(a) Seismic considerations. (1) Portions of new facilities where treatment, storage, or disposal of hazardous waste will be conducted must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time.

(2) As used in paragraph (a)(1) of this section:

(i) "Fault" means a fracture along which rocks on one side have been displaced with respect to those on the other side.

(ii) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(iii) "Holocene" means the most recent epoch of the Quarternary period, extending from the end of the Pleistocene to the present.

[Comment. Procedure for demonstrating compliance with this standard in Part B of the permit application are specified in §270.1(b)(11). Facilities which are located in political jurisdictions other than those listed in Appendix VI of this part, are assumed to be in compliance with this requirement.]

(b) Floodplains. (1) A facility located in a 100-year floodplain must be designed, constructed, operated, and maintained to prevent washout or any hazardous waste by a 100-year flood, unless the owner or operator can demonstrate to the Regional Administrator's satisfaction that:

(i) Procedures are in effect which will cause the waste to be removed safely, before flood waters can reach the facility, to a location where the wastes will not be vulnerable to flood waters; or

(ii) For existing surface impoundments, waste piles, land treatment units, landfills, and miscellaneous units,

no adverse effects on human health or the environment will result if washout occurs, considering;

(A) The volume and physical and chemical characteristics of the waste in the facility;

(B) The concentration of hazardous constituents that would potentially affect surface waters as a result of washout;

(C) The impact of such concentrations on the current or potential uses of water and quality standards established for the affected surface waters; and

(D) The impact of hazardous constituents on the sediments of affected surface wastes or the soils of the 100-year floodplain that could result from washout.

[Comment: The location where wastes are moved must be a facility which is either permitted by EPA under Part 270 of this chapter, authorized to manage hazardous waste by a State with a hazardous waste management program authorized under part 271 of this chapter, or in interim status under parts 270 and 300 of this chapter.]

(2) As used in paragraph (b)(1) of this section:

(i) "100-year floodplain" means any land area which is subject to a one percent or greater chance of flooding in any given year from any source.

(ii) "Washout" means the movement of hazardous waste from the active portion of the facility as a result of flooding.

(iii) "100-year flood" means a flood that has a one percent chance of being equalled or exceeded in any given year.

[Comment: (1) Requirements pertaining to other Federal laws which affect the location and permitting of facilities are found in §270.3 of this chapter. For details relative to these laws, see EPA's manual for SEA (special environmental area) requirements for hazardous waste facility permits. Though EPA is responsible for complying with those requirements, applicants are advised to consider them in planning the location of a facility to help prevent subsequent project delays.]

(c) Salt dome formations, salt bed formations, underground mines and caves. The placement of any noncomtainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave is prohibited, except for the Department of Energy Waste Isolation Pilot Project in New Mexico.

APPENDIX C

40 C.F.R. Part 264

Appendix VI - Political Jurisdictions in Which Compliance With §254.18(a) Must Be Demonstrated

Alaska

Aleutian Islands
Anchorage
Bethel
Bristol Bay
Cordova-Valdez
Fairbanks-Fort Yukon
Juneau
Kenai-Cook Inlet
Ketchikan-Prince of Wales
Kodiak
Lynn Canal-Icy Straits
Palmer-Wassilla-Talkeena
Seward
Sitka
Wade Hampton
Wrangell Petersburg
Yukon-Kuskokwim

Arizona

Cochise
Graham
Greenlee
Yuma

California

All

Colorado

Archuleta
Conejos
Hinsdale
Mineral
Rio Grande
Saguache

Hawaii

Hawaii

Idaho

Bannock
Bear lake
Bingham
Bonneville
Caribou
Cassia
Clark
Franklin
Fremont
Jefferson
Madison
Oneida
Power
Teton

Montana

Beaverhead
Broadwater
Cascade
Deer Lodge
Flathead
Gallatin
Granite
Jefferson
Lake
Lewis and Clark
Madison
Meagher
Missoula
Park
Powell
Sanders
Silver Bow
Stillwater
Sweet Grams
Teton
Wheatland

Nevada

All

New Mexico

Bernalillo
Catron
Grant
Hidalgo
Los Alamos
Rio Arriba
Sandoval
Sante Fe
Sierra
Socorro
Taos
Torrance
Valencia

Utah

Beaver
Box Elder
Cache
Carbon
Davis
Duchesne
Emery
Garfield
Iron
Juab
Millard
Morgan
Piute
Rich
Salt Lake
Sanpete
Sevier
Summit
Tooele
Utah
Wasatch
Washington
Wayne
Weber

Washington

Chelan
Clallam
Clark
Cowlitz
Douglas
Ferry
Grant
Grays Harbor
Jefferson
King
Kitsap
Kittitas
Lewis
Mason
Okanogan
Pacific
Pierce
San Jaun Islands
Skagit
Skamania
Snohomish
Thurston
Wahkiakum
Whatcom
Yakima

Wyoming

Fremont
Lincoln
Park
Sublette
Teton
Uinta
Yellowstone National Park

---

[1] These include counties, city-county consolidations, and independent cities. In the case of Alaska, the political jurisdictions are election districts, and in the case of Hawaii, the political jurisdiction listed is the Island of Hawaii.

APPENDIX D

40 C.F.R. §264.301 Design and operating requirements

(a) Any landfill that is not covered by paragraph (c) of this section or §265.301(a) of this chapter must have a liner system for all portions of the landfill, (except for existing portions of such landfill). The liner system must have:

(1) A liner that is designed, constructed, and installed to prevent any migration of wastes out of the landfill to the adjacent subsurface soil or ground water or surface water at any time during the active life (including the closure period) of the landfill. The liner must be constructed of materials that prevent wastes from passing into the liner during the active life the facility. The liner must be:

(i) Constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(ii) Placed upon a foundation or base capable of providing support to the liner and resistance of pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(iii) Installed to cover all surrounding earth likely to be in contact with the waste or leachate; and

(2) A leachate collection and removal system immediately above the liner that is designed, constructed, maintained, and operated to collect and remove leachate from the landfill. The Regional Administrator will specify design and operating conditions in the permit to ensure that the leachate depth

over the liner does not exceed 30 cm (one foot). The leachate collection and removal system must be:

(i) Constructed of materials that are:

(A) Chemically resistant to the waste managed in the landfill and the leachate expected to be generated; and

(B) Of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and by any equipment used at the landfill; and

(ii) Designed and operated to function without clogging through the scheduled closure of the landfill.

(b) The owner or operator will be exempt from the requirements of paragraph (a) of this section if the Regional Administrator finds, based on a demonstration by the owner or operator, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents (see §264.93) into the ground water or surface water at any future time. In deciding whether to grant an exemption, the Regional Administrator will consider:

(1) The nature and quantity of the wastes;

(2) The proposed alternate design and operation;

(3) The hydrogeologic setting of the facility, including the attenuative capacity and thickness of the liners and soils present between the landfill and ground water or surface water; and

(4) All other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to ground water or surface water.

(c) The owner or operator of each new landfill, each new landfill unit, and each lateral expansion of an existing landfill unit, must install two or more liners and a leachate collection system above and between the liners. The liners and leachate collection systems must protect human health and the environment. The requirements of this paragraph shall apply with respect to all waste received after issuance of the permit for units where the part B of the permit application is received by the Regional Administrator after November 8, 1984. The requirement for the installation of two or more liners in this paragraph may be satisfied by the installation of a top liner designed, operated, and constructed of materials to prevent the migration of any constituent into such liner during the period such facility remains in operation (including any post-closure monitoring period), and a lower line designed, operated, and constructed to prevent the migration of any constituent through such liner during such period. For the purpose of the preceding sentence, a lower liner shall be deemed to satisfy such requirement if it is constructed of at least a 3-foot thick layer of recompacted clay or other natural material with a permeability of no more than 1x10-7 centimeter per second.

(d) Paragraph (c) of this section will not apply if the owner or operator demonstrates to the Regional Administrator, and the Regional Administrator finds for such landfill, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into the ground water or surface water at least as effectively as such liners and leachate collection systems.

(e) The double liner requirement set forth in paragraph (c) of this section may be waived by the Regional Administrator for any monofill, if:

(1) The monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not render the wastes hazardous for reasons other than the Toxicity Characteristic in §261.24 of this chapter, with EPA

Hazardous Waste Numbers D004 through D017; and

(2)(i)(A) The monofill has at least one liner for which there is no evidence that such liner is leaking.

(B) The monofill is located more than one-quarter mile from the underground source of drinking water (at that term is defined in §144.3 of this chapter; and

(C) The monofill is in compliance with generally applicable ground water monitoring requirements for facilities with permits under RCRA 3008(c); or

(D) The owner or operator demonstrates that the monofill is located, designed and operated so as to ensure that there will be no migration of any hazardous constituents into ground water or surface water at any future time.

(f) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portion of the landfill during peak discharge from at least a 25-year storm.

(g) The owner or operator must design, construct, operate, and maintain a run-off management system to collect and control at least the water volume resulting from at 24-hour, 25-year storm.

(h) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(i) If the landfill contains any particulate matter which may be subject to wind dispersal, the owner or operator must cover or otherwise manage the landfill to control wind dispersal.

(j) The Regional Administrator will specify in the permit all design and operating practices that are necessary to

ensure that the requirements of this section are satisfied.

(k) Any permit under RCRA §3005(c) which is issued for a landfill located within the State of Alabama shall require the installation of two or more liners and a leachate collection system above and between such liners, notwithstanding any other provision of RCRA.